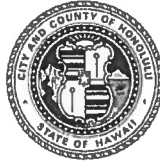


**ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU**

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**ADVISORY OPINION 2017-2**

**I. SUMMARY**

The Honolulu Ethics Commission does not have jurisdiction to decide if a councilmember's receipt of 40 percent or more of campaign contributions by a special interest group creates a conflict of interest under Revised Charter of Honolulu Section 11-102.1(a) because campaign contributions, regardless of amount, are specifically excluded from said section.

Even assuming *arguendo* that acceptance of campaign contributions over a certain percentage was a violation of RCH Section 11-102.1(a), the Commission has no jurisdiction to nullify votes of city councilmembers. The Commission is only empowered to impose civil fines and recommend disciplinary action for violation of the City's ethics laws. This is a matter of first impression.

**II. ISSUES AND SHORT ANSWERS**

Does the Honolulu Ethics Commission ("Commission") have jurisdiction to decide the following issues:

- A. Whether a councilmember's receipt of 40 percent or more of campaign contributions by a special interest group creates a conflict of interest when the councilmember will make official decisions affecting the special interest group?<sup>1</sup>

No, the Commission does not have jurisdiction to decide what percentage of campaign contributions creates a conflict of interest because campaign contributions are specifically excluded from Revised Charter of Honolulu ("RCH") Section 11-102.1(a).

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<sup>1</sup> This question has been restated in order to properly frame the issue.

- B. If A is answered in the positive, were the City Council's five votes approving the Ho'opili Project (Bill 3 (2015)) invalid?

Because the answer to Issue A is in the negative, Issue B is moot. However, assuming *arguendo* that Issue A was answered in the positive, the Commission has no jurisdiction to determine the validity of City Council votes. The Ethics Commission's power is limited to imposing civil fines or recommending disciplinary action for violation of the City's ethics laws.

### III. ANALYSIS

- A. The Commission has no jurisdiction to decide whether a councilmember's receipt of 40 percent or more of campaign contributions by a special interest group creates a conflict of interest when the councilmember will make official decisions affecting the special interest group.

The Ethics Commission has limited jurisdiction to interpret and enforce the Standards of Conduct found in Article XI of the Revised Charter of Honolulu ("RCH") and related ordinances. RCH Sec. 11-107.<sup>2</sup> "[A]n administrative agency can only wield powers

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<sup>2</sup> RCH Section 11-107 provides:

There shall be within the department of the corporation counsel for administrative purposes only an ethics commission which shall consist of seven members. The commission shall be governed by the provisions of Section 13-103 of this charter. In accordance with the prohibition in Article XIV of the Constitution of the State of Hawaii, the members of the ethics commission shall be prohibited from taking an active part in political management or in political campaigns.

The commission may appoint such staff and engage consultants as is necessary to assist it in the performance of its duties. Such staff and consultants may include attorneys who may advise the commission independently of the department of the corporation counsel. All staff positions shall be exempt from the provisions of Chapter 11 of Article VI of this charter, but such staff positions, except the position of executive director and staff attorneys, shall be included in the position classification plan. The executive director shall be an attorney qualified to practice law in the State of Hawaii. The salaries of the executive director and any staff attorneys of the ethics commission shall be set by the ethics commission. The salary of the executive director shall not exceed the salary of the first deputy corporation counsel and the salaries of any other staff attorney shall not exceed the salary of the executive director.

The commission is authorized to hold hearings and to conduct investigations concerning the application of this article of the charter and shall have the powers provided in Section 13-114 of this charter.

The commission may, on its own initiative, render advisory opinions with respect to this article of the charter. An advisory opinion shall be rendered pursuant to a written request of any elected or appointed officer or employee concerned and may be rendered pursuant to the request of any person. The commission shall publish its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of the persons involved.

The commission may impose civil fines established by ordinance against elected and appointed officers and employees of the city with significant discretionary or fiscal power as determined by ordinance, found by the commission to have violated the standards of conduct established by this article of the charter or by ordinance. The commission shall recommend appropriate disciplinary action against officers and employees

expressly or implicitly granted to it by statute.” *Haole v. State*, 111 Haw. 144, 152 (2006).

RCH Section 11-102.1 identifies prohibited conflicts of interest. These include gifts, confidential information, business transactions, financial activities, dual compensation for official duties, and representing private interests against the interests of the city. RCH Section 11-102.1(a), which prohibits city officers and employees from accepting certain gifts, specifically *excludes* campaign contributions from the City’s conflicts of interest laws.

1. No elected or appointed officer or employee shall:

(a) Solicit or accept any gift, directly or indirectly, whether in the form of money, loan, gratuity, favor, service, thing or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the officer or employee in the performance of such person’s official duties. *Nothing herein shall preclude the solicitation or acceptance of lawful contributions for election campaigns.*

Id. (emphasis added). In drafting this exception for campaign contributions, the Charter Commission of 1958 specifically excluded campaign contributions as a conflict of interest:

Code of Ethics – One member suggested that perhaps the first paragraph relating to or receiving gifts, etc., was too restrictive. It would prohibit for example, any elective officer from receiving campaign contributions when seeking re-election. Another member felt that campaign contributions should be covered by laws on elections and not by a ‘code of ethics.’ The Executive Secretary suggested that perhaps ‘campaign contribution’ be **specifically excluded** from the scope of the first paragraph. **The suggestion was adopted unanimously.**

Hon. Charter Comm’n Meeting Minutes (Mar. 24, 1958), p.503 (emphasis added).

Further, the Hawaii State Legislature enacted a law establishing the Hawaii Campaign Spending Commission, a state agency with primary and exclusive jurisdiction over campaign issues. *See* Dep’t Corporation Counsel Formal Op. 58-72 (1958) (A proposed conflict of interest ordinance cannot require elected officials to file with the City Clerk the names of contributors and the sums contributed where any one person contributes the sum of \$250.00 or more for election campaigns due to preemption by state law). *Cf.*, Dep’t Corporation Counsel Formal Op. 72-20 (1972). “Field preemption is when the legislative scheme is so pervasive it occupies the field, leaving no room to supplement the law.” *Reel Hooker Sportfishing, Inc. v. Dept. of Taxation*, 123 Haw. 494, 497 (Haw. Ct. App. 2010) (citing *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992)), *cert. denied*, 2010 Haw. LEXIS 242 (Haw. Oct. 19, 2010); *cert. denied*, 562 U.S. 1272 (U.S. 2011).

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found to have violated the standards of conduct established by this article of the charter or by ordinance. The appointing authority shall promptly notify the commission of the action taken on the recommendation.

B. The Commission has no jurisdiction to nullify City Council's five votes approving the Ho'opili Project (Bill 3 (2015)).

The Commission has limited jurisdiction when applying Article XI of the Revised Charter of Honolulu. The Department of the Corporation Counsel has opined that an ethics law violation would not affect the validity of actions taken by the alleged violator: "The Code of Ethics in the Charter states only that failure to comply with the Code is a ground for removal of an officer. (Sec. 11-102)<sup>3</sup> It does not contain any provision prohibiting participation or voting by such Commissioner...." Dep't Corporation Counsel, Formal Op. 61-145 (Oct. 31, 1961), p. 3-4 (FN added).

The Hawaii Supreme Court concluded that the language of RCH Section 11-103 implies that upon filing of the required disclosure, a councilmember is eligible to vote on a proposal. *Waikiki Resort Hotel v. Honolulu*, 63 Haw. 222, 249 (1981) ("That charter provided in Section 10-103 [currently 11-103] that any member of the city council, who knew that he had 'a personal or private interest, direct or indirect,' in any proposal before the council, should disclose such interest in writing to the council, the disclosure to be made a matter of public record 'prior to the taking of any vote on such proposal,' thus implying that, upon the filing of the required disclosure, such member was eligible to vote on the proposal.")

By the same logic, a councilmember who fails to file the required disclosure is ineligible to vote on legislation and any vote that the councilmember makes is nullified. *Hui Malama Aina O Ko 'olau v. Pacarro*, 4 Haw. App. 304 (1983).

Although the Hawaii Supreme Court concludes that failure to disclose a conflict of interest under RCH Section 11-103 implicitly causes vote nullification, RCH Section 11-103 has not been amended to reflect the opinion of the Hawaii Supreme Court. The Commission is limited to powers that have been expressly or implicitly granted to it by the Charter.

A public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of

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<sup>3</sup> Referring to the Charter of Honolulu (1959) Section 11-102, this section on penalties provides:

The failure to comply with or any violation of one or more of the foregoing standards of conduct by any elective or appointive officer or by any employee shall be additional grounds for the impeachment of elective officers and for the removal from office or from employment of all other officers and employees. Nothing contained herein shall preclude any other remedy available against such officer or employee.

Currently, RCH Section 11-106 articulates penalties for ethics law violations as follows:

The failure to comply with or any violation of the standards of conduct established by this article of the charter or by ordinance shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend, or discharge an employee found to have violated the standards of conduct established by this article of the charter or by ordinance. The ethics commission may also imposed civil fines established by ordinance for violations of the standards of conduct committed by elected and appointed officers and employees of the city with significant discretionary or fiscal power as determined by ordinance.

the statute under which it is conferred. Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down. In other words, an administrative agency can only wield powers expressly or implicitly granted to it by statute.

*Kaleikini v. Thielen*, 124 Haw. 1, 20 (2010). To date, the Commission has no authority to declare the vote invalid, and further has no procedural mechanism to enforce the resulting nullification of legislature tainted by a failure to disclose a conflict of interest.


#### IV. CONCLUSION

As to Issue A, the Commission has no jurisdiction to evaluate whether campaign contributions, regardless of amount, create a conflict of interest as to city officers and employees because such contributions are specifically excluded from RCH Section 11-102.1(a). As to Issue B, the Commission has no jurisdiction to nullify votes of city councilmembers.

  
MICHAEL A. LILLY, Vice Chair  
Honolulu Ethics Commission

DATED: February 12, 2017

APPROVED AS TO FORM AND LEGALITY:

  
JAN K. YAMANE  
Executive Director and Legal Counsel  
Honolulu Ethics Commission

DATED: February 17, 2017